86-682

Supreme Court, U.S.
FILED
JUL 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

UNITED STATES OF AMERICA,

Respondent,

v.

GLENN MOORE HAWKINS
and
MELVIN WILLIAMS,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert B. Schulman
SCHULMAN & TREEM, P.A.
Suite 1431
The World Trade Center
Baltimore, MD 21202
PHONE: 301/332-0850

Howard L. Cardin
211 St. Paul Street
Baltimore, MD 21202
PHONE: 301/727-3868

Attorneys for Petitioners.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the period of delay caused by the government's appeal of an order releasing Petitioner Hawkins on bail should be excludable time under the Speedy Trial Act?

II. Whether evidence should be suppressed where the magistrate issuing a search and seizure warrant was not informed by the government affiants that the informant had failed a polygraph examination as to material questions?

III. Whether polygraph evidence may be admissible when it is offered solely for the purpose of impeaching a witness' veracity and reliability as opposed to the ultimate issue of guilt or innocence?

IV. Whether evidence seized pursuant to a search and seizure warrant issued six months after the alleged criminal conduct qualifies as relevant and admissible evidence?

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinion of the Court Below	1
Statement of Jurisdiction	2
Statement of the Case	5
Arguments	
I. The period of delay caused by the government's appeal of an order releasing Petitioner Hawkins on bail should not be excludable time under the Speedy Trial Act	11
II. Evidence should be suppressed where the magistrate issuing a search and seizure warrant was not informed by the government affiants that the informant had failed a polygraph examination as to material questions	15
III. Polygraph evidence may be admissible where it is offered solely for the purpose of impeaching a witness' veracity and reliability as opposed to the ultimate issue of guilt or innocence	18

Page

IV. Evidence seized six months after the alleged criminal conduct is not relevant or admissible evidence 22

Conclusion 27

TABLE OF CITATIONS

Cases

Brinegar v. United States, 338 U.S. 102 (1965) 18

Illinois v. Gates, 462 U.S. 213 (1983) 17

United States v. Arnott, 704 F.2d 322 (6th Cir. 1983) 26

United States v. Bernal, 719 F.2d 1475 (9th Cir. 1983) 25

United States v. De La Torre, 639 F.2d 245 (5th Cir. 1981) 26

United States v. Estrada-Lucas, 651 F.2d 1261 (9th Cir. 1980) 21

United States v. Grant, 473 F.Supp. 720 (D.S.C. 1979) 21

United States v. Hart, 344 F.Supp. 522 (E.D.N.Y. 1971) 19,20,22

Page

United States v. McDonald, 688 F.2d 224 (4th Cir. 1981), cert. denied, 459 U.S. 1103 (1983) 24

United States v. Miroyan, 577 F.2d 489 (9th Cir. 1978) 26

United States v. Pickelsimer, 585 F.2d 1199 (3d Cir. 1978) 26

United States v. Terry, 702 F.2d 299 (2d Cir.), cert. denied, 461 U.S. 931 (1983) 26

United States v. Webster, 639 F.2d 174 (4th Cir.), cert. denied, 454 U.S. 857 (1981) 19

United States v. Whitt, 718 F.2d 1494 (10th Cir. 1983) 21

Statutes

18 U.S.C. §3145(c) 3,13

18 U.S.C. §3161(h)(1)(E)(J) . . . 2,12-14

18 U.S.C. §3162(a)(2) 4,15

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 3,13

28 U.S.C. §1292 3-4,13

Page

Rules

Fed. R. Evid. 401 5,23,26

Fed. R. Evid. 402 5,23

Fed. R. Evid. 403 5,24

Sup. Ct. R. 17.1(a) 2

Sup. Ct. R. 17.1(c) 2

Miscellaneous

Kaplan, The Lie Detector: An Analysis of Its Place in the Law of Evidence, 10 Wayne L. Rev. 381 (1961) 19

1 Weinstein's Evidence §185 at 435 (2d. ed) 23

22 Wright & Graham, Federal Practice and Procedure: Evidence §5162 at 18 (1978) 23

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Respondent,

v.

GLENN MOORE HAWKINS
and
MELVIN WILLIAMS,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINION OF THE COURT BELOW

The published opinion of the United States Court of Appeals for the Fourth Circuit is reported at 788 F.2d 200 (4th Cir. 1986) and is set forth verbatim in the Appendix ("Appx.") at 1-19.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was filed April 7, 1986. The court denied Petitioners' for Rehearing on May 16, 1986. (Appx. at 20-21.)

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Sup. Ct. R. 17.1(a) and (c).

STATUTES

18 U.S.C. §3161(h)(1)(E)(J)

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--
>
> (E) delay resulting from any interlocutory appeal;
>
> (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

18 U.S.C. §3145(c)

> --An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly.

28 U.S.C. §1291

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. §1292

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the Canal Zone, the District Court of

> Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; ...

18 U.S.C. §3162(a)(2)

> (2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

RULES

Fed R. Evid. 401

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed R. Evid. 402

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Fed. R. Evid. 403

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Walter Robinson is a long time supplier of narcotics who was released from Federal Prison in 1983. Immediately upon his

release, Robinson sought to obtain and distribute large quantities of narcotics. Robinson contacted David Mosteller, an individual with whom he had been incarcerated, and agreed to obtain cocaine through Mosteller's sources. One of those sources turned out to be Drug Enforcement Administration undercover special agent Callahan. Robinson agreed with Mosteller and his source to travel from Maryland to Northern Virginia in June 1984 to procure the cocaine. Since Robinson had no driver's license, he enlisted the aid of two individuals, Stan (last name unknown) and Glenn Hawkins, one of the Petitioners, to drive him to Virginia. Stan drove Robinson on the first trip to Virginia; Hawkins drove Robinson on the second. On that second trip, Hawkins drove Robinson from a Sheraton Hotel to a Holiday Inn to obtain the cocaine. Hawkins remained outside the hotel when Robinson entered to

purchase narcotics from Mosteller's source. Minutes later, Robinson was arrested in the hotel and Hawkins was arrested in the parking lot.

At the time of his arrest, Robinson told Federal agents that the person driving the car, Petitioner Hawkins, was not aware of the illicit activity and admitted he was the only person involved in the cocaine acquisition. While in jail, Robinson, through his common law wife, asked Hawkins and Petitioner Melvin Williams to help him raise bail and hire an attorney. When Hawkins and Williams refused, Robinson contacted the prosecutors and sought to negotiate a favorable plea bargain in return for providing testimony against Petitioners.

Robinson now explained that he had received funds for the Northern Virginia purchase from Petitioner Williams. Robinson also recanted his statements

exculpating Hawkins. At trial Robinson testified that he met with Williams to discuss the deal at the Underground, Williams' night club. Robinson testified that he saw Hawkins at the club, but Hawkins was not present during the discussions. Robinson said that he next met Williams at Williams' residence. He was driven there by Hawkins who left to purchase an air conditioner. Robinson related that Williams handed him a briefcase containing the $100,000 that he ultimately presented to Mosteller's source for the cocaine.

As part of the plea agreement negotiations, informant Walter Robinson agreed to take a polygraph examination to ascertain his credibility and veracity. Robinson was asked, among other questions, "Did Melvin Williams tell you he would finance the cocaine deal?" and "Did Melvin Williams give the money to Glenn Hawkins

to pay for this cocaine?" Both questions were answered affirmatively. The special agent who administered the examination concluded that these answers were "deceptive." In any event, based on his knowledge of other evidence, the special agent opined that Robinson's "deceptiveness" did not indicate that "Melvin Williams did not give Robinson $100,000 in full expectation of participating in a cocaine deal, or that Glenn Hawkins was not the recipient of this money." The Government moved for an order that no references to the results of the polygraph examination be made during the trial. Over Petitioners' strong objections, the motion in limine was granted.

At trial, the Government introduced into evidence numerous items seized from the residence of Petitioner Williams which were obtained pursuant to a search and seizure warrant executed six months after

the alleged criminal conduct. Petitioners moved to suppress this evidence because certain information dealing with the unreliability of the informant was not included in the affidavit for the Magistrate's consideration.

Petitioners also filed a motion to suppress evidence seized from Petitioners in December 1984, nearly six months after the June 1984 crime charged in the Indictment. Admitted against Petitioner Hawkins were $5,000 in cash and an electronic beeping device. Admitted against Petitioner Williams were $30,000, two guns, and an anti-electronic bugging device. This evidence was seized from a search of the respective Petitioners' residences. This motion was denied.

At the conclusion of a three-day jury trial before United States District Judge Richard L. Williams, Petitioner Hawkins was convicted of attempting to possess

cocaine with the intent to distribute and traveling in interstate commerce to promote an unlawful activity. Petitioner Williams was convicted of attempting to possess cocaine with intent to distribute, causing others, and aiding and abetting others, to travel in interstate commerce to promote an unlawful activity, and using a telephone in facilitating the attempted possession of cocaine with intent to distribute. Petitioners were sentenced to maximum periods of incarceration and special parole terms.

On appeal, the United States Court of Appeals for the Fourth Circuit vacated the special parole terms and affirmed in all other respects.

ARGUMENTS

I. **THE PERIOD OF DELAY CAUSED BY THE GOVERNMENT'S APPEAL OF AN ORDER RELEASING PETITIONER HAWKINS ON BAIL SHOULD NOT BE EXCLUDABLE TIME UNDER THE SPEEDY TRIAL ACT.**

Prior to trial, Petitioner Hawkins asserted that the Government sought to bring him to trial outside the time limits of the Speedy Trial Act, 18 U.S.C. §3161 et seq. At issue was the excludability vel non of time devoted to the Government's appeal of an adverse pre-trial detention order. Hawkins argued that appeals from pre-trial detention orders were limited to determining whether the defendant shall be detained or released prior to trial and, therefore, had no impact or delay on the date trial commenced. In Hawkins' view, time expended on the detention-related appeal was to be included in the speedy trial computation. Under this theory, Hawkins would have been brought to trial more than 70 days after the filing of the indictment and in violation of the Speedy Trial Act.

The district court denied Petitioner Hawkins' motion. The court of appeals

held that such time was excludable time under 18 U.S.C. §3161(h)(1)(E) (delay resulting from an interlocutory appeal) and 18 U.S.C. §3161(h)(1)(J) (delay attributable to proceeding concerning the defendant under advisement by the Court). Therefore, in the views of the lower courts, Hawkins was brought to trial within the dictates of the Speedy Trial Act.

The Government appealed the adverse bail release order under 18 U.S.C. §3145(c), a newly enacted provision of the Comprehensive Crime Control Act of 1984. Such appeals are expressly governed by 28 U.S.C. §1291. 28 U.S.C. §1291 discusses appeals of a final decision of a district court whereas 28 U.S.C. §1292 controls interlocutory appeals. Thus, Congress has expressly stated that appeals from release or detention orders are appeals from a final decision and are not interlocutory

in nature. Accordingly, the Fourth Circuit's reliance upon the interlocutory appeal subpart of 18 U.S.C. §3161(h)(1) is clearly erroneous.

Similarly, the period of time spent on the government's appeal of the release order was not excludable time under 18 U.S.C. §3161(h)(1)(J) as a proceeding concerning Petitioner Hawkins insofar as the merits of the case. Manifestly, days spent on appeals of detention issues are irrelevant to speedy trial consideration for whether a defendant is retained or released has no bearing on a trial date. In either instance, the trial date remains unaltered. Thus, the Fourth Circuit erred by failing to include the time spent on the release appeal in the speedy trial calculations.

Inasmuch as Petitioner Hawkins was brought to trial outside the parameters of the Speedy Trial Act, the court of appeals

erred by not reversing the conviction and remanding the matter to dismiss the indictment. 18 U.S.C. §3162(a)(2).

II. EVIDENCE SHOULD BE SUPPRESSED WHERE THE MAGISTRATE ISSUING A SEARCH AND SEIZURE WARRANT WAS NOT INFORMED BY THE GOVERNMENT AFFIANTS THAT THE INFORMANT HAD FAILED A POLYGRAPH EXAMINATION AS TO MATERIAL QUESTIONS.

The Government sought a warrant to search and seize evidence from the home of Petitioner Williams. The request for a warrant, made six months after the June 1984 crime charged in the indictment, was accompanied by affidavits which, among other things, included information provided by informant Walter Robinson. The Government did not, however, inform the magistrate that Robinson had failed a lie detector test as to Petitioners' role in the narcotics transaction.

The court of appeals sidestepped the government's omission by observing that "[t]he magistrate knew that there was some

question about Walter Robinson's veracity because he was aware that Robinson was named as a defendant in the original indictment, denied any involvement in the offense, and later entered into an agreement with the government and admitted his participation in the crime." (Appx. at 17.)

By responding in this fashion to the dubious conduct of the Government's law enforcement officials, the intermediate federal appellate court appears to countenance the purposeful withholding of information from the magistrate. Such a policy tends to relegate the magistrate to the role of a rubber stamp and encourages the Government to withhold possibly damaging information from the warrant affidavit. Moreover, the fact that the magistrate may have been aware of Robinson's plea arrangement did not notify that judicial offer that Robinson had flunked a

polygraph examination relating to key portions of his testimony.

In Illinois v. Gates, 462 U.S. 213 (1983), this Court held that probable cause must be determined upon a review of the totality of the circumstances. Fundamentally, to review the totality of the circumstances, the magistrate must be made aware of all the circumstances. By purposely providing only those facts which were helpful to the prosecution and deleting those which are detrimental to its position, the Government frustrated the intent of Gates.

Unequivocally, despite other surveillance efforts, Walter Robinson's statements provided the bedrock for finding probable cause to issue the search and seizure warrant. Discounting his statements, or reviewing the remaining facts stated in the affidavit and considering Robinson's information in a considerably diminished

capacity, the remaining information does not rise to the level of probable cause for the magistrate to believe that Petitioner Williams committed, was committing, or was going to commit an offense. Brinegar v. United States, 338 U.S. 102 (1965). Hence, the warrant should not have been issued and the admission of the fruits of that search was in error.

III. POLYGRAPH EVIDENCE SHOULD BE ADMITTED WHERE IT IS OFFERED SOLELY FOR THE PURPOSE OF IMPEACHING A WITNESS' VERACITY AND RELIABILITY AS OPPOSED TO THE ULTIMATE ISSUE OF GUILT OR INNOCENCE.

Petitioners were precluded at trial from impeaching Robinson's testimony based on the deceptive answers provided during his polygraph examination. The Fourth Circuit failed to address this contention in its published opinion.

Petitioners acknowledge that the admissibility of polygraph evidence is

within the discretion of the trial court, see, e.g., United States v. Webster, 639 F.2d 174, 186 (4th Cir.), cert. denied, 454 U.S. 857 (1981), and that such evidence is generally excluded because of the reluctance to interfere with the jury's determination of a witness' credibility. Kaplan, The Lie Detector: An Analysis of Its Place in the Law of Evidence, 10 Wayne L. Rev. 381 (1961). Nevertheless, polygraph evidence should be ruled admissible where it is offered solely for the purpose of establishing or impeaching a witness' veracity and reliability rather than on the ultimate issue of guilt or innocence.

So held the court in United States v. Hart, 344 F.Supp. 522 (E.D.N.Y. 1971), where the government's principal witness blurted out during cross-examination that he had taken a lie detector test. The tests, requested by the government

indicated the witness had been untruthful, and that the prosecution was aware of the results before putting him on the witness stand. A mistrial was declared and the court determined that this evidence would be admissible at the retrial.

> Having requested that [the witness] submit to polygraph tests, and then rejected the conclusions of the tests, the government should be prepared to show (a) the prior experience with polygraph tests and with the particular testers which led the Bureau of Narcotics and Dangerous Drugs to have [the witness] submit to the tests; (b) the basis for the subsequent doubts about the validity of polygraph tests which led to the disregard of the results; and (c) any other relevant material concerning the tests which defendants may request from the government on their own behalf.
>
> The bearing of the lie detector test of [the witness'] credibility should be determined by the jury and not by a prior court hearing.

Id. at 524 (emphasis supplied). The Hart

rationale has been found to be "convincing," United States v. Whitt, 718 F.2d 1494, 1501-02 at n.8 (10th Cir. 1983), and has been cited with approval in United States v. Grant, 473 F.Supp. 720, 725 (D.S.C. 1979). Likewise, polygraph results were permitted for purposes of witness impeachment and rehabilitation in United States v. Estrada-Lucas, 651 F.2d 1261 (9th Cir. 1980).

Petitioners do not suggest, and did not below, that polygraph evidence should always be admissible. Instead, Petitioners submit that such evidence, to the extent that it relates to the credibility of a witness, should be admissible to assist the fact finder's assessment of a witness. This is particularly true where, as here, the polygraph is administered as part of a plea arrangement. What could be more relevant than the fact that answers provided by the Government's key witness

had been deemed "deceptive" by the Government's own polygraph examiner? Instead of dismissing those results as a consequence of the special agent's presumed knowledge of other corroborating evidence, the Government, as in Hart, should have been compelled to have the examiner explain his doubts as to the results and let the jury determine what emphasis should be placed on the polygraph tests and Robinson's testimony. An instruction limiting the jury's consideration to the credibility of the witness and not the culpability of the defendants would assure the proper use of this polygraph results.

IV. EVIDENCE SEIZED SIX MONTHS AFTER THE ALLEGED CRIMINAL CONDUCT IS NOT RELEVANT OR ADMISSIBLE EVIDENCE.

Petitioners sought to suppress certain evidence seized in December 1984 maintaining that such evidence bore no relevance to and were not probative of the alleged

criminal conduct occurring in June 1984. While the panel hearing this appeal focused the majority of oral argument on this issue, the Fourth Circuit's opinion does not discuss this point.

Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Implicit in that definition are two distinct requirements: (1) The evidence must be probative of the proposition it is offered to prove, and (2) the proposition to be proved must be one that is of consequence to the determination of the action. 1 Weinstein's Evidence §185 at 435 (2d. ed); 22 Wright & Graham, Federal Practice and Procedure: Evidence §5162 at 18 (1978).

Evidence which is not relevant is not

admissible. Fed. R. Evid. 402. Fed. R. Evid. 403 precludes the admissibility of evidence "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." The trial judge is vested with broad discretion in ruling on relevancy and in balancing the probative value of relevant evidence versus any undue prejudice. United States v. McDonald, 688 F.2d 224, 227-28 (4th Cir. 1981), cert. denied, 459 U.S. 1103 (1983). A lower court's ruling on this issue will be reversed upon a finding of abuse of discretion. Id. at 228.

Succinctly stated, the fact that Petitioners possessed large sums of cash, an electronic beeping device, weapons and an anti-electronic bugging device in

Baltimore in December 1984 does not prove or tend to prove Petitioners' culpability for events occurring in Northern Virginia in June 1984. Therefore, the offered evidence was irrelevant and its admission was an abuse of discretion.

Even assuming arguendo that the challenged evidence was relevant, its probative value to the prosecution was outweighed by the prejudice caused to Petitioners. Undoubtedly, the possession of guns, money, and electronic equipment had a prejudicial impact on the jury's evaluation of Petitioners' purported conduct in June 1984. While certain courts, in balancing probity against prejudice, have permitted the admission of weapons and money, in each of those cases the weapons and cash were seized at the time of arrest or execution of warrant and at the place where narcotics were stored. See, e.g., United States v. Bernal, 719

F.2d 1475, 1478 (9th Cir. 1983); United States v. Arnott, 704 F.2d 322, 325-26 (6th Cir. 1983); United States v. Terry, 702 F.2d 299, 318 (2d Cir.), cert. denied, 461 U.S. 931 (1983); United States v. De La Torre, 639 F.2d 245, 249-50 (5th Cir. 1981); United States v. Pickelsimer, 585 F.2d 1199, 1204 (3d Cir. 1978); United States v. Miroyan, 577 F.2d 489, 494-95 (9th Cir. 1978). No case goes so far as to state that probity outweighs prejudice where the prosecution seeks to introduce guns, money and electronic equipment seized six months after and a hundred miles away from the narcotics activity. Because the probity of this evidence paled in comparison to the prejudice to Petitioners, F.R. Evid. 403 precluded its admission. The district court's admission of this prejudicial evidence for the jury's consideration deprived Petitioners of a fair trial and mandates the reversal

of their convictions.

CONCLUSION

For the aforegoing reasons, Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit and that its decision be reversed.

Respectfully submitted,

ROBERT B. SCHULMAN
SCHULMAN & TREEM, P.A.
Suite 1431
The World Trade Center
Baltimore, MD 21202
PHONE: 301/332-0850

HOWARD L. CARDIN
211 St. Paul Street
Baltimore, MD 21202
PHONE: 301/727-3868

Attorneys for Petitioners

FILED
JUL 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-68

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

UNITED STATES OF AMERICA,

Respondent,

v.

GLENN MOORE HAWKINS
and
MELVIN WILLIAMS,

Petitioners.

JOINT APPENDIX

Robert B. Schulman
SCHULMAN & TREEM, P.A.
Suite 1431
The World Trade Center
Baltimore, MD 21202
PHONE: 301/332-0850

Howard L. Cardin
211 St. Paul Street
Baltimore, MD 21202
PHONE: 301/727-3868

Attorneys for Petitioners.

23pp

TABLE OF CONTENTS

	Page
Opinion of the Court Below	1-19
Order Denying Petition for Rehearing	20-21

OPINION OF THE COURT BELOW

UNITED STATES of America, Appellee,

v.

Glenn Moore HAWKINS, Appellant.

UNITED STATES of America, Appellee,

v.

Melvin WILLIAMS, Appellant.

Nos. 85-5109, 85-5110.

United States Court of Appeals,

Fourth Circuit.

Argued Jan. 9, 1986.

Decided April 7, 1986.

Howard Cardin and Robert B. Schulman (Schulman & Treem, P.A., Baltimore, Md., on brief), for appellants.

Early Giovanniello and John Martin, Sp. Asst. U.S. Attys. (Elsie L. Munsell, U.S. Atty., Justin W. Williams, Asst. U.S. Atty., Joseph H. Aronica, Asst. U.S. Atty., Alexandria, Va., on brief), for appellee.

Before WINTER, Chief Judge and SPROUSE

and CHAPMAN, Circuit Judges.

CHAPMAN, Circuit Judge:

Appellants Glenn Moore Hawkins and Melvin Williams were convicted by a jury in the Eastern District of Virginia of attempting to possess cocaine with intent to distribute in violation of 21 U.S.C. §§846, 841(a)(1) (1982) and 18 U.S.C. §2 (1982). Defendant Hawkins and Erstelle Datcher were convicted of traveling in interstate commerce to promote an unlawful activity in violation of 18 U.S.C. §1952(a)(3) (1982). Williams was also convicted of causing others, and aiding and abetting others, to travel in interstate commerce to promote an unlawful activity in violation of 21 U.S.C. §841(a)(1) (1982). In addition, Williams was convicted of using a telephone in facilitating the attempted possession of cocaine with intent to distribute in violation of 21 U.S.C. §843(b) (1982).

Appellants raise several exceptions, but we find that only three warrant discussion. First, Hawkins contends that under the Speedy Trial Act, 18 U.S.C. §3161 et seq. (1982), the period of delay caused by the government's appeal of an order admitting Hawkins to bail should not be excluded in determining whether he was brought to trial within seventy days of the filing of the indictment or from his first appearance before a judicial officer. Second, they except to the introduction of evidence taken from Williams' residence under a search warrant. They also claim that the affidavit supporting the warrant did not establish probable cause because certain information contained in the affidavits resulted from an illegal wiretap and because information dealing with the unreliability of an informant was not brought to the attention of the magis-

trate. Third, appellants correctly note the error of the district court in adding a special parole term of five years to the sentence of each defendant under Count 1 of the indictment. For the reasons hereinafter stated, we find no error in the trial of the case, and we affirm, but we vacate the special parole term of five years added to the sentence of each defendant under Count 1 of the indictment.

I

Appellants were arrested on December 6, 1984, in Baltimore, Maryland, and on December 10 they were ordered removed to the Eastern District of Virginia and held without bond. They were arraigned in Alexandria on December 17, 1984. Shortly thereafter, they moved for a revocation of the magistrate's detention order; on December 21, 1984, the district court reversed the magistrate's order and set a bail bond of $200,000. The United States

immediately appealed, and on January 15, 1985, this court reversed the district judge's order admitting defendants to bail. 753 F.2d 329. The trial of the case began February 5, 1985, and the jury returned its verdict of guilty on all counts on February 7, 1985.

Appellant Hawkins was previously indicted on July 3, 1984, on the same charges contained in the present indictment. The first indictment was dismissed on the government's motion on August 27, 1984. It is obvious from a review of the record that the first indictment was dismissed because Walter Robinson, a codefendant named therein, entered into a plea agreement with the United States and supplied information used by the grand jury to indict Melvin Williams, who was not a defendant in the first indictment. The parties are in agreement that fifty-three days of speedy trial time elapsed

before the first indictment was dismissed.

Drug Enforcement Administration agents executed a search warrant of Melvin Williams' home on December 5, 1984, and found several firearms and a large quantity of gold jewelry. The warrant was supported by fifty pages of affidavits. Appellants contend that these affidavits were based in part on information obtained from illegal wiretaps and that the affidavits did not set forth the unreliability of one of the sources of information. The affiants were five members of the Baltimore Police Department with years of experience in drug investigations.

II

It is Hawkins' position that the speedy trial clock, which had consumed fifty-three days during the first indictment, began to run again on December 18, 1984, and ran for ten days until he made a number of pretrial motions on December 28,

1984. The district court had these motions under advisement until its ruling on January 25, 1985, and Hawkins admits that this period is excluded under §3161(h)(1)(F). Hawkins asserts that the clock commenced to run again on January 16, 1985, and ran eleven days until the trial began February 5, 1985. Under Hawkins' figures, these three periods of time total seventy-four days and thereby violate the requirements of the Speedy Trial Act. We reject his computation because it does not exclude the time used for the government's appeal of the bail order.

Our examination of the clear language of §3161(h) convinces us that the time used to appeal the bail order is excludable from the seventy-day period provided by the Statute. Section 3161(h) provides:

> The following periods of delay shall be excluded in computing the time within which an information or an

> indictment must be filed, or in computing the time within which a trial of any such offense must be considered:
>
> (1) any period of delay resulting from other proceedings concerning the defendant, including but not limited to--
>
> * * *
>
> (E) delay resulting from any interlocutory appeal;
>
> * * *
>
> (J) delay reasonably attributable to any period, not to exceed 30 days, during which any proceeding concerning the defendant is actually under advisement by the court.

The appeal of the bail order certainly concerned the defendant, and the language of §3161(h)(1) and its subparts (A) through (J) clearly indicates that the listed subparagraphs are merely illustrative and are not intended to be the only proceedings concerning the defendant that would result in a tolling of the seventy-day period.

Under both (E) and (J), the time for the government's appeal of the bail order is excluded. This appeal was clearly interlocutory: It occurs between the commencement of the litigation and the conclusion thereof, and it decides one issue but not the entire controversy. The appeal of the bail order would also be excluded under (J) because it was a proceeding concerning the defendant and was under advisement for a period not exceeding thirty days. See United States v. Black, 733 F.2d 349 (4th Cir. 1984).

The time for interlocutory appeal ran from December 21, 1984, when the government filed its notice of appeal, until January 15, 1985, when this court reversed the bail order. On January 15, 1985, the district court still had under advisement the defendants' pretrial motions, which were decided on January 25, 1985. Therefore, all time between December 21,

1984, and January 25, 1985, was excludable. As a result, only sixty-seven days of speedy trial time elapsed between Hawkins' first appearance under the first indictment and the beginning of his trial under the second indictment. The language of §3161(h)(1) is unambiguous, and under United States v. Turkette, 451 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981), this language must ordinarily be regarded as conclusive.

III

Both appellants moved to suppress certain evidence obtained from the search of Williams' home on December 5, 1985. Hawkins did not reside at the Williams residence, and there was no evidence that would support any expectation of privacy by him in the residence or its contents. Since Hawkins had no expectation of privacy, he had no fourth amendment protection as to this search. Rakas v.

Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

Williams makes two points in attacking the search warrant. First, he claims that much of the information in the affidavits filed with the magistrate was obtained through the use of illegal wiretaps or was the fruit of such illegal wiretaps. Second, he claims that the officers did not advise the issuing magistrate that Walter Robinson had "flunked" a polygraph examination conducted by an FBI agent at the request of the United States Attorney to determine Robinson's reliability. Appellants assert that if the wiretap information and Walter Robinson's information is removed from the affidavits, there is not enough remaining to establish the probable cause required to issue the search warrant.

Williams claims that any information resulting from the wiretap should be

excluded because this electronic surveillance, although court approved, was not authorized as a part of an investigation of the present defendants. He also claims that the affidavits used to obtain the wiretap orders were not sufficient.

The trial judge did not rule on the legality of the wiretaps, but considered the affidavits filed in support of the search warrant of the Williams residence as if redacted to exclude any information based upon the wiretaps. He found, "looking at the four corners of it and taking out the wiretap information, I think there is probable cause for the magistrate." He followed this conclusion with his statement of other evidence in the affidavits that supported probable cause to issue the warrant. The action of the district judge in considering the affidavits without the wiretap information is in keeping with Franks v. Delaware, 438

U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) and United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984). In Franks v. Delaware, the court stated:

> In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliber-

> ate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

438 U.S. at 171, 98 S.Ct. at 2684.

We have no finding by the district court that the wiretaps used to develop certain information in the affidavits were illegal. There is only the claim of illegality by the appellants, and the trial judge took the cautious approach and disregarded this information. There is no claim that the affiants (the police

officers and drug agents) made deliberate false statements or recklessly disregarded the truth in preparing the affidavits.

In discussing the affidavits without considering the wiretap information, the trial judge mentioned Walter Robinson, who was very knowledgeable in drug matters. Robinson stated that he had received $100,000 from Williams at Williams' home in order to buy cocaine for distribution, that he had received a cutting agent from Williams, and that cocaine was distributed at Williams' nightclub, known as "The Underground." There were other informants indicating that drugs were distributed at the nightclub. There were the affidavits of officers concerning their knowledge as to the drug culture and Williams' connection therewith.

Also, there were the statements, resulting from surveillance of Williams' home, that he frequently walked a short

distance from his house to a pay telephone. This activity was in keeping with a drug dealer's effort to keep telephone calls from being traced. The drug agents had a clone telephone beeper for Williams' telephone contact beeper, and it indicated a suspicious pattern of calls to other suspected members of the distribution organization. Williams also had unexplained income, and it is customary for drug dealers to maintain certain books, records, and other evidence of their activities in their homes.

Other information available was that Melvin Williams was on parole for a prior narcotics-related conviction and the statement by Robinson's wife that Williams had told her that he had lost $100,000 on Walter Robinson and was not going to help him arrange bail.

The claim that Walter Robinson "flunked" his polygraph test is exaggerated. The

report of the polygraph examiner, an FBI agent, indicates deception when answering two of the questions asked during the polygraph examination, which was quite lengthy. The two questions showing deception were whether Robinson saw Williams give the money to Hawkins to purchase the cocaine and whether Williams said he would finance the cocaine deal. These were important questions, but the FBI had information which corroborated almost all of the other information given by Walter Robinson and used in the affidavits.

The magistrate knew that there was some question about Walter Robinson's veracity because he was aware that Robinson was named as a defendant in the original indictment, denied any involvement in the offense, and later entered into an agreement with the government and admitted his participation in the crime. Failure

to advise the magistrate of the results of Robinson's polygraph examination is not the deliberate falsity or reckless disregard for the truth mentioned in Franks. The fifty pages of affidavits submitted to the magistrate, even when redacted, contained ample support for a finding of probable cause.

IV

Appellants were convicted of attempted possession of cocaine with intent to distribute in violation of 21 U.S.C. §846; in addition to a sentence of fifteen years and a fine of $25,000, the court imposed a special parole term of five years. In Bifulco v. United States, 447 U.S. 381, 398, 100 S.Ct. 2247, ____, 65 L.Ed.2d 205 (1980), the Supreme Court found that Congress did not authorize the sentencing court to impose a term of special parole upon a defendant convicted under this section. In United States v. Webster, 639

F.2d 174 (4th Cir. 1981), we found the proper action in these circumstances was to vacate the special parole sentences. Therefore, we vacate the special parole term of five years which was added to the sentences of appellants Glenn Moore Hawkins and Melvin Williams as a result of their convictions under Count 1 of the indictment. On every other point, we affirm.

AFFIRMED IN PART AND VACATED IN PART.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 85-5109

United States of America,

Appellee,

versus

Glenn Moore Hawkins,

Appellant.

No. 85-5110

United States of America,

Appellee,

versus

Melvin Williams,

Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Richard L. Williams,
District Judge

Upon consideration of appellants' motion for leave to file their petition for rehearing out of time, as well as consideration of the petition for rehearing

itself,

IT IS ORDERED that the motion for leave to file the petition out of time is granted.

IT IS FURTHER ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Chapman for a panel consisting of Chief Judge Winter, Judge Sprouse and Judge Chapman.

For the Court,

(John M. Greacen)
Clerk

Filed: May 16, 1986